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Nos. ~~83-73 and~~ 83-5083

In the Supreme Court of the ~~United States~~

OCTOBER TERM, 1983

PAUL L. FERRANTE AND RANDY JAMES MYERS, PETITIONERS

v.

UNITED STATES OF AMERICA

HERMAN MERS AND LESTER MERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were denied the effective assistance of counsel because all four were represented at trial by a single lawyer.

2. Whether petitioners' trial began within the 70 days required by the Speedy Trial Act of 1974, 18 U.S.C. (& Supp. V) 3161.

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OPINION BELOW

The opinion of the court of appeals (83-73 Pet. App. 1a-43a) is reported at 701 F.2d 1321.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1983. A petition for rehearing was denied on May 16, 1983. The certiorari petitions were filed on July 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted of conspiring to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846 (count one), and distribution of marijuana, in violation of 21 U.S.C. (& Supp. V) 841 (count two). Petitioner Herman Mers was sentenced to concurrent nine-year terms of imprisonment on each count, to be followed by three years of special parole. Petitioner Lester Mers was sentenced to concurrent 12-year terms of imprisonment on each count and three years of special parole. Petitioner Ferrante was sentenced to concurrent five-year terms of imprisonment on each count and five years of special parole. Petitioner Myers was sentenced to concurrent three-year terms of imprisonment and three years of special parole.

1. On January 21, 1981, petitioner Herman Mers began negotiating the sale of a large quantity of marijuana with two undercover DEA agents (3 R. 64-67).[1] As part of those negotiations, the two agents flew to Atlanta and met Herman Mers, who drove them to the house of his son, petitioner Lester Mers, to inspect samples of the marijuana (83-73 Pet. App. 7a; 3 R. 67-69). From then until February 4, 1981, both the Merses and the agent had several conversations and meetings to make final arrangements for the sale, including one visit to a safe deposit box in an Atlanta bank, where Herman Mers took about an hour to examine and count the $2.75 million that the agents were to use as payment for the marijuana (83-73 Pet. App. 7a; 3 R. 80, 83, 85-86).[2] Finally, the conspirators agreed that Lester Mers would deliver the marijuana to one agent, while his father

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[1]"R." refers to the record on appeal.

[2]The tape recordings the agents surreptitiously made during these meetings were introduced at trial (83-73 Pet. App. 7a).

and another agent waited at a restaurant. Once the transfer of the marijuana was complete, the key to the safe deposit box containing the money would be delivered to the Mers. 83-73 Pet. App. 7a.

This initial sale of marijuana was scheduled for February 6, 1981. On that day, Lester Mers and a DEA agent went to Mers's house to obtain 2,000 pounds of marijuana. After examining the marijuana, which was stored in a truck, the agent instructed a second agent to drive the truck to New York. During the inspection, petitioners Ferrante and Myers waited in a car about one block away from Mers's house. When the marijuana-laden truck pulled away, Ferrante and Myers began to follow it. 83-73 Pet. App. 7a. When Ferrante and Myers drove past Mers and the agent, they stopped and Lester Mers said: "[D]on't worry about the marijuana. Follow me. These guys are good for the money" (*id.* at 7a-8a). Ferrante and Myers then followed Lester Mers and the agent to the restaurant where Herman Mers waited with another agent. As the party left the restaurant for the place where the money was to be exchanged, all the petitioners were arrested (*id.* at 8a). Petitioner Myers was armed with a Luger pistol and a .38 caliber handgun (3 R. 117), Ferrante was carrying a .357 magnum (3 R. 128), and agents found a .30 caliber rifle in the back seat of the car (3 R. 129).

2. Bruce Pashley, an Atlanta criminal defense lawyer, represented all petitioners from their arrest until the end of trial (83-73 Pet. App. 8a). In his defense, petitioner Herman Mers did not dispute his involvement in the scheme, but claimed that he had been entrapped by Michael Fiori, his neighbor and a government informant, who had allegedly pressured him into participating in the transaction. Petitioner Lester Mers invoked a "vicarious entrapment theory" (83-73 Pet. App. 42a). He conceded that he had had no

direct contact with the government's informant; he nevertheless claimed he had been entrapped, reasoning that since his father had been entrapped and as his father's son he was compelled to help him, he too had been entrapped (*id.* at 17a). In contrast, petitioners Ferrante and Myers argued that they thought they had been recruited to guard a truckload of valuable antiques and thus had played no part at all in the conspiracy (*ibid.*).

3. On appeal, petitioners raised, *inter alia*, the two issues they raise again before this Court: (1) whether they were tried within the time prescribed by the Speedy Trial Act of 1974, 18 U.S.C. (& Supp. V) 3161 *et seq.*; and (2) whether they were denied the effective assistance of counsel because all four petitioners were represented by a single lawyer at trial. The court of appeals rejected both contentions.[3]

The court of appeals concurred in the district court's admission that its examination of petitioners regarding their understanding of the potential conflicts of interest that

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[3]The court of appeals also rejected petitioners' other claims. It held (83-73 Pet. App. 41a-42a) that Lester Mers's statements had been properly admitted into evidence as co-conspirator statements because there was substantial independent evidence of the conspiracy and petitioners' participation in it. See *United States* v. *James*, 590 F.2d 575 (5th Cir.), cert. denied, 442 U.S. 917 (1979)). It also held that the district court's denial of Lester Mers's request for an entrapment instruction was not an abuse of discretion because, as a matter of law, he had not been entrapped (83-73 Pet. App. 42a). Nor, the court ruled, did the facts of this case support Lester Mers's theory that this had been a full-circle transaction, in violation of due process, in which a government agent provides drugs to a subject and another agent purchases them (*id.* at 42a-43a). Finally, it rejected the Mers's argument that the government's failure to disclose Fiori's arrest record and material relating to the existence of a remunerative arrangement between Fiori and the government violated their due process rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), because they offered no theory of how such material was relevant and admissible (83-73 Pet. App. 43a). It similarly dismissed as inapposite their claims based on Fed. R. Evid. 608, 609 and 404(b) because Fiori was not called as a witness (83-73 Pet. App. 43a).

might arise from their joint retention of trial counsel did not comply with the requirements of Fed. R. Crim. P. 44(c) or *United States* v. *Garcia*, 517 F.2d 272 (5th Cir. 1975) (83-73 Pet. App. 11a). The court concluded, however, that this error would not require reversal unless there had been an actual conflict of interest (*id.* at 11a-12a). Because petitioners were unable to show " 'specific instances in the record to suggest an actual conflict or impairment of their interests' " (*id.* at 16a, quoting *United States* v. *Fox*, 613 F.2d 99, 102 (5th Cir. 1980)), it held that "Pashley's representation of all four defendants did not create an actual conflict of interest" because petitioners' defenses were "not antagonistic, much less mutually exclusive" (83-73 Pet. App. 18a).

The court of appeals also rejected petitioners' speedy trial claim. In particular, it held that 18 U.S.C. (Supp. V) 3161(h)(1)(J), which allows exclusion of any period, not to exceed 30 days, while a motion is under advisement, does not require a *total* of only 30 days for the separate considerations of both the magistrate and the district court.[4] When both the magistrate and the district court consider the same matter, the court could properly exclude up to 30 days for the "under advisement" period of each (83-73 Pet. App. 31a-41a).[5] According to the court of appeals' calculations, petitioners were brought to trial on the 56th day of

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[4]In addition, the court also decided that 18 U.S.C. (Supp. V) 3161(c)(2), which provides that trial will not commence within 30 days after a defendant first appears with counsel, does not prohibit the exclusion of any time occurring within the first 30-day period (83-73 Pet. App. 25a-31a).

[5]The Judicial Conference's Guidelines to the Administration of the Speedy Trial Act of 1974 state flatly that " 'when a pretrial matter is considered by both a magistrate and a judge pursuant to [the Magistrates Act], the Committee believes that the [Speedy Trial Act] permits *two thirty day periods* for consideration of the same matter' " (83-73 Pet. App. 35a; emphasis in original).

unexcluded time, thus satisfying the requirement of the Speedy Trial Act of 1974 (*id.* at 25a n.6).[6]

ARGUMENT

1. Petitioners revive (83-5083 Pet. 17-19; 83-73 Pet. 14-19) for this Court's consideration their claim that they were denied the effective assistance of counsel. They contend that failure to conduct the inquiry required by Fed. R. Crim. P. 44(c) and Fifth Circuit precedent (*United States* v. *Garcia, supra*) mandates reversal even without a showing that an actual conflict resulted from their counsel's joint representation.[7] We disagree.

The purpose of Fed. R. Crim. P. 44(c) is to establish a procedure for avoiding the occurrence of what might otherwise give rise to a plausible post-conviction claim based on a conflict of interest (83-73 Pet. App. 12a). "[N]either the inquiry nor the advice is itself the goal of the rule; the goal is preventing conflicts. If there is no actual conflict, then the rule's purpose will not be served by reversal of a conviction." *United States* v. *Benavidez*, 664 F.2d 1255, 1258 (5th Cir.), cert. denied, 457 U.S. 1135 (1982).

As the court of appeals observed, "[i]t would be the height of formalism to reverse a conviction because of literal noncompliance with a procedural rule when the evil

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[6]The court of appeals did not reach another of petitioners' speedy trial contentions — whether the 70-day period should begin on March 2, 1981 (date of arraignment), or on February 18 (date of indictment) —because the addition of the disputed 11-day interval to the net non-excludable time would not have exceeded 70 days (83-73 Pet. App. 25a n.6). Although petitioners Ferrante and Myers do not reargue this issue, they do persist in calculating the commencement of time from February 18 instead of March 2, the date the court of appeals used (83-73 Pet. 10).

[7]Petitioners Ferrante and Myers also argue (83-73 Pet. 16-17) that the court of appeals erroneously applied its own precedent. Such an intra-circuit conflict, if any, is for the court of appeals to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

that the rule has been designed to prevent has never occurred" (83-73 Pet. App. 12a). The advisory committee note to Rule 44(c) supports that interpretation: "The failure in a particular case to conduct a rule 44(c) inquiry would not, standing alone, necessitate the reversal of a conviction of a jointly represented defendant." 77 F.R.D. 507, 603 (1978). Petitioners offer no authority to controvert this eminently reasonable conclusion.

The proper inquiry under the circumstances of this case, therefore, is whether Pashley's representation of all four petitioners created an actual conflict of interest. Both the district court and the court of appeals reviewed petitioners' defenses and the evidence at trial, considered the possible alternative defenses, and concluded that the joint representation had not produced a conflict of interest (83-73 Pet. App. 18a-24a). That fact-bound question does not warrant further consideration by this Court. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

2. Petitioners also contend (83-5083 Pet. 11-16; 83-73 Pet. 10-14) that they were not brought to trial within the 70 days prescribed by the Speedy Trial Act of 1974, 18 U.S.C. (Supp. V) 3161(c)(1).[8] Apparently accepting the court of appeals' holding that two 30-day "under advisement" periods under 18 U.S.C. (Supp. V) 3161(h)(1)(J) must be allowed for the separate considerations by the magistrate and district judge (83-73 Pet. App. 33a-38a), petitioners now contend that excluding the 26 days for the magistrate's consideration was erroneous. They argue that because the

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[8]Although petitioners Ferrante and Myers did not raise or discuss any speedy trial issue in their brief in the court of appeals, they arguably preserved the issue — albeit obliquely —in a blanket prefatory statement in which they "adopt[ed] the applicable issues raised in the brief of co-Appellant, Herman Mers" (C.A. Br. v).

magistrate advised the parties orally at the conclusion of the April 22 hearing of the recommendations he intended to make, nothing remained "under advisement," and therefore it was error to exclude as the magistrate's "under advisement" time the period between April 22 and May 18, when the magistrate issued his report and recommendation (83-5083 Pet. 14-15; 83-73 Pet. 12, 14).

The court of appeals dismissed this "creative argument[]" (83-73 Pet. App. 32a) when it held that the April 22-May 18 period was properly excludable under 18 U.S.C. (Supp. V) 3161(h)(1)(J).[9] Petitioners' failure to offer any pertinent authority supporting their position[10] demonstrates that there is no need for this Court to address the issue.

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[9]Petitioners' submission founders on both statutory and practical grounds. A magistrate's written findings and recommendations, not any prior oral statement, represent the conclusion of his deliberations on a pretrial motion referred to him under 28 U.S.C. (& Supp. V) 636(b)(1). The magistrate does not "rule" on a motion referred to him by the district court, he issues a written report and recommendation, which the court is free to adopt or reject. 28 U.S.C. (& Supp. V) 636(b)(1). Therefore, although the magistrate orally announced his decision on April 22 (which marked the end of excludable time under 18 U.S.C. (Supp. V) 3161(h)(1)(F) (83-73 Pet. App. 32a)), his consideration of the matter was not concluded until he issued his findings and recommendations for district court review.

[10]The allegedly conflicting cases upon which petitioners rely provoke no conflict at all. *United States* v. *Bufalino*, 683 F.2d 639 (2d Cir. 1982), cert. denied, No. 82-596 (Jan. 10, 1983); *United States* v. *Raineri*, 670 F.2d 702 (7th Cir. 1982), cert. denied, No. 82-265 (Nov. 29, 1982); *United States* v. *Stafford*, 697 F.2d 1368 (11th Cir. 1983); *United States* v. *DeLongchamps*, 679 F.2d 217 (11th Cir. 1982). Although these cases discuss how the 30-day "under advisement" period should be computed, none addresses whether the magistrate and the judge is each permitted a 30-day "under advisement" period or whether the magistrate's tentative announcement of his recommendations precludes exclusion of any "under advisement" period. Furthermore, any conflict with *United States* v. *Stafford* or *United States* v. *DeLongchamps*, *supra*, both Eleventh Circuit cases, is more properly addressed to the Eleventh Circuit en banc. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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